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HUMAN RIGHTS COMMITTEE

Sixty-seventh session

SUMMARY RECORD OF THE 1803rd MEETING

Held at the Palais des Nations, Geneva,
on Monday, 1 November 1999, at 10 a.m.

Chairperson: Ms. MEDINA QUIROGA

later: Ms. EVATT
(Vice-Chairperson)

later: Ms. MEDINA QUIROGA
(Chairperson)

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The meeting was called to order at 10.05 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (agenda item 6) (continued)

Initial report of the People's Republic of China on the Hong Kong Special Administrative Region (continued) (CCPR/C/HKSAR/99/1)

1. At the invitation of the Chairperson, Mr. Qiao Zoughuai (China), Mr. Lan, Mr. Allcock, Mr. S. Wong, Ms. Lam, Mr. Dean, Mr. So, Ms. Chu, Ms. Yau, Ms. Chan and Mr. P. Wong (Hong Kong Special Administrative Region - HKSAR) resumed their places at the Committee table.

2. Mr. QIAO Zoughuai (China) said that under the Sino-British Joint Declaration and the Basic Law of the HKSAR, the Covenant had continued to be applicable after 1 July 1997. Although China was not currently a party to the Covenant, it was now transmitting the HKSAR report to the Committee under the principle "One country, two systems", in order to enable the international community to gain a better understanding of the human rights situation in the Region, and as a contribution to the promotion and protection of human rights in general.

3. Mr. LAN (Hong Kong SAR) said that Hong Kong was an open society, which operated in a free market economy underpinned by the rule of law and the unfettered flow of ideas and information. Its Constitution, known as the Basic Law, guaranteed the fundamental rights and duties of its residents, in line with the provisions of the Covenant. The presence of a number of NGOs at the meeting was evidence of Hong Kong's commitment to a free and open society.

4. The report made mention of the judgement of the Court of Final Appeal in the matter of the right of abode, which had been delivered on 19 January 1999. That judgement meant that an extra 1.6 million mainland-born people would be entitled to enter and live in Hong Kong, increasing the population by 26 per cent. The expansion in housing, schools, hospitals, transport and social services needed to cater for such a large influx of people would involve additional costs of over US$ 91 billion, which would have to be met at the expense of plans to improve the living standards of the existing population.

5. Hong Kong had a long tradition of absorbing migrants from the mainland. Although it was one of the most densely populated places in the world, with nearly 6,000 people per square kilometre, it admitted some 54,000 new residents every year. Unfortunately, the court's interpretation of articles 22 and 24 of the Basic Law had effectively removed the mechanisms that enabled Hong Kong to control the rate of entry and thus the growth rate of its permanent population. In order to remedy that situation, either an interpretation of the Basic Law or an amendment to it was needed, and that could only be carried out by the Standing Committee of the National People's Congress.

6. The Standing Committee had issued its interpretation on 26 June 1999. Under that interpretation, article 22 meant that persons of Chinese nationality born outside Hong Kong were eligible for right of abode only if,

at the time of their birth, at least one of their parents had already had such right of abode. It also meant that mainland residents born of Hong Kong permanent residents had to apply for approval from mainland authorities for entry into Hong Kong for the purpose of settlement. Contrary to the views of some critics, he believed that the decision to refer the matter to the Standing Committee - a non-judicial body - was entirely consistent with the rule of law. The interpretation given would not diminish the status of the Court of Final Appeal, nor would it undermine judicial independence. The decision to seek an interpretation was an exceptional measure to deal with exceptional circumstances, and had had the overwhelming support of the Hong Kong community and of a clear majority of its legislature. There had been no attempt to overturn the ruling of the Court of Final Appeal: the interpretation had changed only the principles to be applied to claims for right of abode that had been pending when interpretation had been made, and to those made after it. Lastly, power of interpretation related only to the Basic Law itself, and could not be exercised in relation to common-law principles or to Hong Kong's own statutory provisions.

7. There had been much debate in recent months on the issue of press freedom and freedom of expression. In his view, concerns that those freedoms were threatened by the proposal to establish a Press Council for the Protection of Privacy were unjustified. The proposal had not in fact come from the Government: it was included in a discussion paper on the regulation of media intrusion issued by the Privacy Sub-Committee of the Law Reform Commission as part of a study on which it had been engaged for 10 years. The Government was keeping an open mind, and would consider the Commission's final report, taking full account of the views of interested parties, as well as its own commitment to protecting the right to privacy and freedom of the press.

8. The CHAIRPERSON invited the delegation to reply to the list of issues (CCPR/C/67/L/HKSAR/1) prepared by the Committee, which read:

"Status of the Covenant and conformity of laws with it (art. 2)

1. Please explain how eventual conflicts between the Basic Law and the Covenant or between the Hong Kong Bill of Rights Ordinance (BORO) and the Covenant are resolved and how the primacy of the Covenant is ensured in domestic legislation and practice (report, paras. 11-24).

2. Bearing in mind that article 39 of the Basic Law stipulates that the provisions of the Covenant shall remain in force in HKSAR, can individuals invoke and the courts rely on those provisions not included in BORO?

3. Please elaborate on the composition, including appointment and removal, and scope of operation of the Ombudsman's Office (paras. 26, 40-44). Please give examples of cases examined and investigations conducted by the Ombudsman, and of the response given by HKSAR authorities to the Ombudsman's recommendations. Please elaborate on the information contained in paragraph 211 of the report according to which between 1994 and 1997 the Ombudsman received over 500 complaints from

prisoners, only 9 of which were considered substantiated. Please indicate the number of complaints received by the Ombudsman since 1997 and their disposition.

4. What remedies are available to persons who suffer violations of Covenant rights by non-governmental actors, for example, discrimination on the ground of race?

5. Please provide additional information on education and training on the Covenant provided to government officials, judges, lawyers, schoolteachers and police officials.

Derogation and states of emergency (art. 4)

6. How is article 18 (3) of the Basic Law compatible with article 4 of the Covenant? How would non-derogable rights be protected in a case of a state of emergency? (report, paras. 95-97).

Right to life (art. 6)

7. Please explain the execution in December 1998 of HKSAR citizens Cheung Tze-Keung, Chin Hon-sau and Chan Chi-hou for crimes committed in HKSAR, in spite of the abolition of the death penalty in HKSAR. Why did not the HKSAR seek the return of these persons in order that they be tried and sentenced by the courts of the place where the offences were committed? Has an agreement been negotiated by HKSAR to obtain the return of HKSAR citizens accused of crimes committed in the HKSAR for trial in HKSAR?

Detention and treatment of prisoners (arts. 7, 9, 10)

8. In addition to the case referred to in paragraph 114, how many police officers have been charged or convicted in relation with offences committed against persons arrested or detained?

Right to fair hearing, independence of the judiciary

9. Article 19 of the Basic Law vests the HKSAR with independent judicial power, including that of final adjudication (report, para. 265). Please explain the impact on the independence of the judiciary of the decision of 26 June 1999 of the Standing Committee of the National Peoples' Congress overturning the interpretation of the final decision of 26 January 1999 of the Court of Final Appeal (cases Na Ka Ling (an infant) & Others v. Director of Immigration and Chan Kam Nga (an infant) & Others v. Director of Immigration). How is the action of HKSAR Government to obtain from the Standing Committee of the National Peoples' Congress an interpretation of article 24 (2) (3) of the Basic Law consistent with article 158 (3) of that Law? How is the resulting situation compatible with articles 2 (2) and 14 of the Covenant?

Right to enter one's own country, expulsion of aliens; protection of the family and rights of the child (arts. 12, 13, 23, 24)

10. What has been the effect of the recent interpretation of article 24 (2) (3) of the Basic Law on persons already in Hong Kong SAR and on those in mainland China seeking to enter the HKSAR under that Law? How many are affected this way?

11. Please explain how persons claiming a right of abode in Hong Kong SAR under article 24 (2) (3) of the Basic Law secure a valid travel document and certificate of entitlement. Do the courts of Hong Kong have jurisdiction to determine whether a person has such a right of abode? How do those persons who are in mainland China have access to the courts of HKSAR to determine their status under article 24? What other requirements or conditions apply?

12. How does the decision to abolish the 'port of first asylum policy' affect the repatriation of aliens, particularly Vietnamese? (paras. 165-167)

Right to hold opinions, freedom of expression and the media (art. 19)

13. To what extent has strong government criticism of the media, and in particular the RTHK, contributed to a climate of self-censorship and reluctance to discuss freely sensitive political issues (see report, paras. 334-349)

Right to freedom of association, trade union rights, peaceful assembly (arts. 21, 22)

14. In regard to the right of peaceful assembly, please give precise details of the grounds of objection by the police and the reasons which must be provided under the Public Order Ordinance for such objection. How have the recommendations of the Independent Police Complaints Committee been implemented, and how has this changed police practice? (report, paras. 382, 387)

15. Please comment on the compatibility of the revision of the Societies Ordinance (paras. 389-392) with articles 21 and 22 of the Covenant. In particular, comment on the compulsory registration of associations. How many applications for registration have been granted and how many denied? What are the criteria used in deciding whether or not to register?

16. Please comment on the compatibility of Amendments to the Employment Ordinance (paras. 393-403) with article 22 of the Covenant.

Gender equality, violence against women, prohibition of discrimination (arts. 3, 23 and 26)

17. Please comment on the application of the Sex Discrimination Ordinance (1995) and the Family Status Ordinance (1997). What is the

percentage of women in senior positions in government, in governmental advisory boards and statutory committees, in the judiciary, and in the private sector?

18. Please comment on the effectiveness of the Domestic Violence Ordinance. Please provide information on violence against women, including rape and marital rape. Are there any programmes for counselling and rehabilitation of victims?

Participation in public affairs (art. 25)

19. Please indicate whether and to what extent the rules relating to the composition, election and functioning of the Legislative Council and the District Council are compatible with the stated willingness of the HKSAR Government to consolidate and develop the democratic functioning of the institutions on the basis of universal suffrage and with due respect to the principle of equality.

20. How are the recent abolition of Municipal Councils and the replacement of District Boards with District Councils whose members are partly nominated compatible with the stated aims of the HKSAR Government to strengthen public participation in community affairs (paras. 469, 475)?

21. To what extent do property, descent and marriage requirements and conditions deny to women the equal right to be elected as village representative? What steps have been taken to ensure that all women are able to exercise the right to vote in these village elections?

Dissemination of information about the Covenant (art. 2)

22. Please indicate the steps taken to disseminate information on the submission of the report and its consideration by the Committee and, in particular, on the Committee's concluding observations."

9. Mr. ALLCOCK (Hong Kong SAR), responding to question 1 of the list of issues, said that under article 39 of the Basic Law, the provisions of the Covenant as applied to Hong Kong would remain in force and would be implemented through existing legislation. The same article provided that the rights enjoyed by Hong Kong residents should not be restricted except as prescribed by law, and that such restrictions should not contravene the provisions of the Covenant as applied to Hong Kong. The Covenant enjoyed a special constitutional status and was in effect part of the Basic Law. Any conflict between the two would be resolved by an interpretation of the relevant articles, including article 39, and efforts would be made to reconcile the provisions in a way which would not cause a breach of the Covenant.

10. The Bill of Rights Ordinance (BORO) gave effect in local law to the relevant provisions of the Covenant. Any conflict between it and a provision of the Basic Law would almost certainly create a conflict between that provision and article 39, which would again be resolved by an interpretation

of the Basic Law itself. There was no question of the protection offered by the BORO being automatically overridden by a conflicting provision of the Basic Law.

11. The primacy of the Covenant was ensured in domestic legislation by a combination of articles 39, 11, 8 and 160 of the Basic Law. Article 11 provided that no law enacted by the legislature should contravene the Basic Law. Thus, any provision enacted after reunification which restricted the rights and freedoms of Hong Kong in a way inconsistent with the Covenant would breach the Basic Law and would not be enforced by the courts. The same applied to any laws enacted before reunification.

12. The primacy of the Covenant was ensured in practice by a wide range of measures. Thus, there was a Steering Committee in charge of activities to promote understanding of the Basic Law, including rights under the Covenant, and a team of lawyers whose task it was to advise the Government on how far proposed legislation was compatible with it. Independent bodies, such as the Police Complaints Committee, the Equal Opportunities Commission, and the Office of the Ombudsman, performed a monitoring role, as did NGOs and the media.

13. Mr. S. WONG (Hong Kong SAR) replying to question 2, said the provisions of the Covenant not included in the BORO were those in respect of which reservations and declarations applied. Article 39 of the Basic Law was unlikely to provide an avenue for individuals to invoke such provisions. However, although certain Covenant rights were not guaranteed, they could be protected by other means: for instance, the right of a child to acquire a nationality under article 24 was provided for by the Nationality Law of China. Similarly, the Prisons Ordinance, in its regulations on custodial discipline and channels of appeal, took into account the rights of persons deprived of their liberty.

14. Mr. DEAN (Hong Kong SAR), responding to question 3, said the Ombudsman was appointed by the Head of State for a term of five years, after which he would be eligible for reappointment. He could be removed from his post only on grounds of inability to discharge his functions or for misbehaviour. The Ombudsman's Office currently had a staff of 32, which included 2 administrators and 30 investigators.

15. The scope of operation of the Ombudsman was defined in the BORO: he was empowered to investigate and report on grievances arising from maladministration. He currently had jurisdiction over almost the whole of government, with the exception of the police and the Independent Commission against Corruption. He could use his discretion, within the parameters of the BORO, in deciding whether a complaint warranted investigation, and also had discretion in regard to matters arising from provisions prohibiting any appeal or review in particular circumstances.

16. On the matter of complaints from prisoners, 33 per cent of the 500 complaints received over the three-year period were the result of failures of communication and had been resolved without need for investigation. A further 10 per cent had been settled internally by the Correctional Service, and some 19 per cent had been found unactionable due to having been withdrawn

or insufficiently substantiated. Twenty-six per cent had been outside the Ombudsman's jurisdiction, either because they were within the scope of other appeals channels or because they did not relate to maladministration. Thus, only 12 per cent of the original 500 complaints had been eligible for consideration by the Ombudsman, and of those 60 cases, only 9 had been substantiated.

17. Between 1 January 1997 and 30 September 1999 there had been 7,464 complaints, of which 2,630 had been outside the Ombudsman's jurisdiction and 918 had been withdrawn or discontinued. Six hundred and eighty-five complaints had been investigated, 1,936 had been settled informally, 30 had been resolved by mediation, and 1,265 handled by the Service's own mechanisms.

18. One example was a complaint by a Nigerian prisoner that he had been rudely treated when detained for purposes of an inquiry. Owing to contradictions between the accounts of witnesses, the complaint had not been substantiated, but the Ombudsman had nevertheless recommended that videotape facilities should be installed to prevent any possible mistreatment during interviews. Another example was a complaint by a prisoner that he had only been allowed three minutes for an urgent phone call to his wife in mainland China. Although he had subsequently withdrawn the complaint, the Ombudsman had nevertheless investigated it, and found that prison staff had in fact behaved correctly and shown considerable flexibility by allowing the prisoner to speak for longer than the regulation three minutes on other occasions.

19. Mr. DEAN (Hong Kong SAR), replying to question 4 of the list of issues, said that rights in Hong Kong were given effect through various instruments, the most outstanding being the BORO. While the BORO was binding on the Government and the public authorities, it did not extend to citizens' rights, many of which were governed by specific provisions of domestic legislation. The most important were the laws on discrimination on grounds of sex, disability and family status. Privacy was also protected under the Personal Data (Privacy) Ordinance. All of the above were consistent with article 2 of the Covenant.

20. The right to security of the person was guaranteed basically by the Offences against the Person Ordinance, which made it an offence to inflict wounds. There were no specific laws against racial discrimination by private individuals, but adequate provisions existed in the domestic laws to cover racially-motivated acts of violence and prohibit incitement to racial hatred by either individuals or organizations. Distinction on the basis of race, colour, religion, or national or ethnic origin was also prohibited. The penalty depended on the gravity of the offence. Further, the Societies Ordinance provided for issuance of a ban on operations of a society deemed prejudicial to the public order and security of Hong Kong. In the current context, it meant that any society formed for the purpose of fomenting racial hatred or strife would be barred forthwith.

21. Section 33/1 of the Television Ordinance prohibited broadcasts that incited hatred on account of colour, race, sex, religion, nationality or ethnic or national origin. The Film Censorship Ordinance banned projection of films that insulted any particular category of person by reference to any of the above. Similarly, the Codes of Practice and Programme Standards for radio

and television broadcasts contained provisions forbidding the broadcast of any programme likely to incite hatred or denigrating any category of person.

22. There was no single umbrella remedy for all types of racial discrimination, but particular remedies did exist. A person assaulted on racial grounds could bring a civil action for compensation. Similarly, faced with evidence that a broadcast might incite racial hatred, the Chief Secretary for Administration could apply to the Court under section 33 of the Television Ordinance or section 13 (m) of the Telecommunication Ordinance for an order to ban the programme. Moreover, article 39 of the Basic Law, which incorporated the Covenant as it applied to Hong Kong, authorized any person to challenge racially-discriminatory conduct in the courts. Remedies were also available under other domestic laws for persons who suffered violation of other Covenant rights.

23. Mr. LAN (Hong Kong SAR), in response to question 5, said that human rights education in the Covenant was provided for senior government officials, judges and teachers. Application of the BORO to the normal duties of Hong Kong civil servants was an important component of education in the Covenant for middle-level and senior government officials. The legal parameters of article 21 (c) of the BORO, which corresponded to article 25 (c) of the Covenant, formed part of a human rights management module for the executive grade of the civil service. Also, virtually all policy bureaux and many government departments had been involved in the drafting of the Hong Kong report as part of "on-the-job" training in the Covenant, in addition to the formal training courses designed for civil servants at that level.

24. The Hong Kong judiciary operated within the international world of common law and followed developments in all areas, including human rights law, in other common-law jurisdictions. The Judicial Studies Board provided continuing education and training for judges by organizing seminars. Judges of Hong Kong's various courts had attended prestigious international conferences and visited law institutions abroad. In April 1990, a Hong Kong High Court judge had chaired an international panel discussion on "Augusto Pinochet and the pursuit of justice in violations of human rights: implications for international law and Hong Kong". And Hong Kong would be holding a seminar on equal opportunities for judges and judicial officers in March 2000.

25. In the past year, seven training sessions on the BORO organized by the Justice Department had been attended by over 160 government judicial officers. During the same period more than 50 lawyers had participated in congresses on the BORO organized by the universities and other academic institutions.

26. Training was also provided for newly recruited police constables and inspectors, while recently promoted superintendents of police were required to attend a human rights cadre featuring presentations by outside associations, including Amnesty International. Over the previous 12 months the Customs and Excise, Immigration, and Correctional Services Departments had all organized training sessions and panel discussions on the BORO for their staff. In May 1992 the Operations Department of the Independent Commission against Corruption (ICAC), which had the vital task of maintaining a corruption-free society and civil service, had set up a special research unit with the

specific mandate to monitor the various departments' compliance with the BORO and the implications for the Commission's operations. It had recently held two seminars on the BORO for its investigators.

27. The Education Department arranged in-service human rights training for teachers, who could in turn pass that knowledge on to students. The Department had also commissioned tertiary institutions, such as the Chinese University of Hong Kong and the Hong Kong Institute of Education, to provide civic education courses for primary and secondary schoolteachers and principals. They had also developed course modules covering human rights, with particular reference to the two Covenants. In collaboration with Hong Kong's very active Committee on the Promotion of Civic Education, the Education Department had produced human rights teaching kits and resource materials for students at all levels and distributed them to every school in the HKSAR.

28. Mr. S. WONG (Hong Kong SAR), replying to question 6 on states of emergency, pointed out that article 18 (3) of the Basic Law applied only to a state of war or turmoil which endangered national unity or security and was beyond the control of the Government of the HKSAR, the clear implication being that the HKSAR was primarily responsible for quelling the turmoil in the first instance. Under article 14 (2) of the Basic Law, the Government of the HKSAR was responsible for maintaining public order, since the police and other law enforcement agencies were capable of dealing with any conceivable internal security problems.

29. The possibility of the extreme scenarios envisaged in Basic Law article 18 were remote, in the light of Hong Kong's public order situation. The power granted under article 18 (3) would be read with article 39 (1), which provided that the provisions of the Covenant, as applied to Hong Kong, would remain in force and be implemented through the territory's laws. Article 39 of the Basic Law further provided that the rights and freedoms enjoyed by Hong Kong residents could not be restricted, except as prescribed by law, and that any such restriction could not contravene article 39 (1). Accordingly, the emergency powers granted under article 18 (3) would be read with article 4 of the Covenant concerning derogation from Covenant rights.

30. Ms. LAM (Hong Kong SAR), replying to question 7, said that Cheung Tze-Keung and his co-accused had been tried in mainland China not only for offences relating to alleged kidnapping in Hong Kong, but also for others involving the smuggling of firearms and explosives to mainland China, where they had been arrested. While some of the offences had indeed been committed in Hong Kong, they had been planned, and largely prepared, in mainland China, and other crimes had been committed there. The Chinese courts had exercised jurisdiction, not because Hong Kong was part of China, but in accordance with the Chinese Criminal Code, which made the accused justiciable on the mainland.

31. Cheung Tze-Keung and his co-accused had been executed under the laws of the jurisdiction in which they had been convicted, which in no way affected the position in Hong Kong, where there was no death penalty. Hong Kong had been unable to seek the return of the accused in the absence of any formal rendition arrangements - underpinned by legislation - between the mainland and the HKSAR. There was, however, an administrative arrangement with the

mainland authorities whereby Hong Kong residents who were fugitive offenders were returned to the HKSAR in two circumstances: if they had allegedly committed offences in Hong Kong alone; or if they had allegedly committed offences under the laws of the mainland, had been there and had served sentence, if appropriate. In the case of the accused, neither of those conditions had pertained: non-Hong Kong-resident fugitive offenders were not covered by that special arrangement. The mainland authorities had thus far surrendered to Hong Kong 128 fugitive offenders, none of them mainland residents. Since reunification, the HKSAR Government had assiduously continued its efforts to conclude rendition arrangements with the mainland, and had already initiated talks on arrangements for the surrender of fugitive offenders. However, caution was the watchword, given the differences in the two legal and judicial systems. Any long-term arrangement must be made with the aim of achieving a balance between the need to prevent criminals from escaping justice and the need to safeguard the rights of individuals.

32. Ms. YAU (Hong Kong SAR), responding to question 8, said that in the past three years six police officers had been charged under the Offences against the Person Ordinance. There had been the four referred to in the report (para. 114), who had subsequently been convicted under that Ordinance of assault occasioning actual bodily harm and sentenced to 4-6 months in prison. There had been a case in which a police constable had been convicted of common assault in May 1997 for slapping one of a group of boys reportedly causing a disturbance at a football ground. Convicted and fined in April 1998, the constable had lodged an appeal, which had been allowed by the Court of First Instance in September 1998. The outcome of the sixth case, described in the supplementary material (para. 48) recently distributed to Committee members, was that the Court of First Instance had convicted the perpetrator of manslaughter and sentenced him to indefinite confinement to a psychiatric institution.

33. Mr. ALLCOCK (Hong Kong SAR), replying to question 9 concerning interpretation of article 24 of the Basic Law, said a similar question had recently been raised in a case before the Hong Kong Court of Final Appeal. Pending its final judgement, however, his reply would perforce concentrate on the HKSAR Government's view of the law.

34. It was vital to understand the respective roles of the Hong Kong courts and the Standing Committee of the National People's Congress (SCNPC) under the Basic Law, preparation of which had called for a system catering to two fundamentally different legal systems. The solution had been to establish three principles. The first was found in article 19 of the Basic Law investing the HKSAR with independent judicial power, including that of final adjudication, and reflecting Hong Kong's common-law history. The second was found in article 158 (1) of the Basic Law, vesting the authority to interpret the Basic Law in the Standing Committee, thus reflecting article 67 (4) of the Chinese Constitution and the mainland's civil law tradition. The third was found in article 158 (2) and (3) of the Basic Law, whereby the Standing Committee authorized the HKSAR courts to interpret the provisions of that Law when adjudicating cases, but requiring it, in certain cases, to seek a prior interpretation from the SCNPC. That requirement had been based on former article 177 (currently article 234) of the 1957 Treaty Establishing the

European Community. The result of those three principles was to grant power of final adjudication to the Court of Final Appeal, and power of final interpretation to the Standing Committee.

35. The HKSAR's request for an interpretation of article 24 (2) (3) of the Basic Law had been entirely consistent with article 158 (3). The Hong Kong Government was convinced that the Standing Committee's power to interpret the Basic Law under its article 158 (1) was not restricted by the terms of article 158 (2) or (3). The SCNPC had authority to interpret any article of the Basic Law, not solely those referred to it by the HKSAR courts. Equally consistent was the fact that the interpretation had been requested by Hong Kong's Chief Executive, since requests for interpretation by the SCNPC were not the preserve of the courts. In particular, article 158 (3) of the Basic Law did not detract from the Chief Executive's duties under that Law; article 43 provided that he was accountable to the Central People's Government, and article 48 (2) that he was responsible for its implementation. In requesting assistance in resolving a problem encountered in the implementation of the Basic Law, he was merely fulfilling those duties.

36. Turning to judicial independence, he said the Court of Final Appeal had pronounced itself powerless to question the SCNPC's authority to make an interpretation under article 158. A Standing Committee interpretation of the Basic Law was part of the HKSAR's new constitutional order and was perfectly consistent with the rule of law, by which everyone, including the judiciary, must abide. Judges should, of course, be free to render judgements in accordance with the law and without hindrance. Nonetheless, the courts could not, in the name of judicial independence, deviate from a Standing Committee interpretation.

37. On the contrary, the rule of law required the courts to comply with those authoritative statements. He stressed that, in ruling on cases in accordance with the law, Hong Kong judges were not fettered by SCNPC interpretations, nor was the power of final adjudication of the Court of Final Appeal. Those judgements were final insofar as they applied to those parties, and would remain so even if the SCNPC were to put a different interpretation on the Basic Law. That interpretation would affect only the principles to be applied to other persons' right-of-abode claims that had been pending or filed after the interpretation.

38. Hong Kong's compliance with article 2, paragraph 2, of the Covenant was ensured in a variety of ways, the most significant being the enactment of the BORO and the promulgation of the Basic Law, which incorporated the Covenant as it applied to Hong Kong. Under the HKSAR's new constitutional order, the ultimate power to interpret the Basic Law was vested in the SCNPC and formed part of the constitutional process. The legislative and other measures that gave effect in Hong Kong to the rights recognized in the Covenant were necessarily subject to that process, which accorded fully with article 2, paragraph 2, of the Covenant.

39. In conclusion, there had been no contravention of article 14 of the Covenant, the parties in the two right-of-abode cases having received a fair and public hearing by the HKSAR's independent courts.

40. Ms. Evatt (Vice-Chairperson) took the Chair.

41. Ms. CHU (Hong Kong SAR), responding to question 10, which related to the port of first asylum policy, said the SCNPC's interpretation of the Basic Law clearly established that, under its article 24 (2) (3), persons of Chinese nationality born outside Hong Kong were eligible for right of abode on one of two conditions: one parent must have been born in Hong Kong or normally resided there for a continuous period of seven years at the time of the birth. The interpretation did not affect the right of abode which the parties concerned had acquired in accordance with the 29 January 1999 judgement of the Court of Final Appeal. An estimated 3,700 people had acquired the right of abode by that means. The interpretation applied to all other person who had claimed right of abode in relation to article 24 (2) (3), whether physically in Hong Kong or still on the mainland.

42. Regarding the numbers affected, a 1999 survey conducted by the Census and Statistical Department had shown that the interpretation had reduced the number of persons on the mainland immediately eligible for right of abode under article 24 (2) (3) from an estimated 694,000 to 170,000. That meant that the approximately 110,000 children of those 694,000 would no longer be eligible for right of abode, since at the time of their birth their parents had still been living on the mainland and had not fulfilled the second condition.

43. Turning to question 11 on application for the right of abode, she said a person from the mainland who claimed to be eligible to exercise that right in Hong Kong under article 24 (2) (3) of the Basic Law must apply for a certificate of entitlement from Hong Kong's Director of Immigration. The application must be submitted on the mainland through the Bureau of Exit/Entry Administration. An application for a certificate of entitlement was simultaneously an application for a valid travel document in the form of a one-way permit; no separate application was required. Successful applicants were asked to collect the two documents at an office of the Bureau on the mainland.

44. Regarding jurisdiction to determine the right of abode, she said the Hong Kong courts had jurisdiction to adjudicate cases brought by persons from the mainland who sought remedy concerning a decision of the Director of Immigration to reject their claim to right of abode. Persons from the mainland had access to the courts of HKSAR through their local agents or legal representatives.

45. Turning to question 12 on the "port of first asylum policy", she said it had been a response to the mass exodus of refugees in the aftermath of the Viet Nam war and had applied exclusively to persons from Viet Nam. The policy had been abolished in January 1998 because the Comprehensive Plan of Action had formally ended, the circumstances in Viet Nam had changed, and illegal arrivals from Viet Nam had been seeking not asylum but illegal employment. Since the policy's abolition, illegal arrivals from Viet Nam were being treated in the same way as illegal arrivals from anywhere else, namely, they were detained and then repatriated to their country of origin as soon as practicable. An effective mechanism had been established whereby the Government of Viet Nam sent officials to Hong Kong to verify the identity of

illegal arrivals and to give clearance for their return. Generally speaking, illegal arrivals could be returned to Viet Nam within three to four months, and in some cases in less than a month.

46. Mr. LAN (Hong Kong SAR), replying to question 13, said that the Government had never engaged in any criticism of the media or of Radio Television Hong Kong (RTHK), nor was it aware of any allegation of such criticism. Private individuals had, indeed, expressed criticism from time to time, but they did not represent the Government or anti-media organizations. Such criticism was normal in a free society, where freedom of expression was practised and greatly valued by all sectors. The criticism was in fact reported by the media. Far from leading to a climate of self-censorship or reluctance to discuss sensitive political issues, the criticism was almost invariably met by a strong community response.

47. Hong Kong was a free society and had one of the freest presses in the world. The HKSAR Government was fully committed to maintaining freedom of expression. The Chief Executive and senior members of the Government had time and again reiterated that RTHK would continue to enjoy editorial independence.

48. Ms. Medina Quiroga (Chairperson) resumed the Chair.

49. Mr. ANDO thanked the Government of China for the voluminous information provided and commended it for consulting NGOs in preparing its report to the Committee. The presence of many NGO representatives, who had come from Hong Kong for the consideration of the report, was a good sign that democracy was working and freedom of expression was a reality. He hoped that trend would continue. The Committee greatly welcomed the submission of the report, an act which alleviated some doubts about who would carry out the reporting responsibility for Hong Kong following the hand-over of sovereignty by the United Kingdom.

50. He wished to hear additional information about the request from the Chief Executive to the Standing Committee for an interpretation of article 24 (2) (3) of the Basic Law. He understood the factual situation: a sudden increase in the flow of people arriving from the mainland, which could affect the economy and society of Hong Kong and even cause a breakdown in existing mechanisms. The delegation had given a detailed explanation of the legal basis for the request, primarily that the Chief Executive had responsibility for the general administration of the territory and an obligation to report thereon to the Central People's Government. But was that in itself a sound basis for such a request?

51. The separation of powers differed in each legal culture, but in each it was necessary to prevent abusive interpretation of written laws. The meaning of a law, once written, could evolve according to changing circumstances. Since the Basic Law had been promulgated by the National People's Congress, the Congressional Standing Committee had exact knowledge of the intent of the legislators. But independence of the judiciary meant that individuals other than the legislators should have the final word in the interpretation of the provisions adopted. Aside from the general responsibilities of the Chief Executive, was there any provision in the Basic Law that authorized him to make a request like the one he had made to the Standing Committee?

Interpretation, the delegation had clearly stated, was different from amendment. The effect of the Standing Committee's decision appeared to be that of substantive amendment, however, and he would like further clarification on the difference.

52. According to article 160 (1) of the Basic Law, laws that, following the hand-over of sovereignty, were found to contravene the Basic Law would be amended or would cease to have force. He would like to hear examples of laws that had ceased to have force in pursuance of that provision.

53. Concerning Hong Kong's reservation to article 25 (b) of the Covenant, which had the effect that universal and general suffrage was not used in the election of members of the Legislative Council, he said the report (paras. 461-465) clearly showed that time limits had been set with a view to furthering democratic participation in elections. He would welcome further information on concrete measures being taken to promote such participation, and whether all members of the Council would one day be elected by direct suffrage.

54. Lastly, concerning freedom of expression, he said that, according to his information, the Director of RTHK had recently been sent to take up a different post in Japan. The inhibitive effects of such a development on freedom of expression were extremely dangerous, and he requested further information on the reasons for the director's removal.

55. Mr. BHAGWATI congratulated the Government of China and the HKSAR Government on producing a highly informative report. It did not attempt to hide shortcomings in compliance with obligations under the Covenant, and marked the beginning of a dialogue between the new regime in Hong Kong and the Committee, which would surely be fruitful. He likewise welcomed the interest taken by Hong Kong NGOs in the observance of human rights.

56. He remained concerned about the case referred to in question 9: the reinterpretation by the Standing Committee of a decision handed down by the Court of Final Appeal. Under article 158 (3) of the Basic Law, when questions arose as to interpretation of that Law concerning affairs which were the responsibility of the Central People's Government or concerning the relationship between the central authorities and the HKSAR, they were to be referred to the Standing Committee. When a case came before a court for final appeal and the process of adjudication involved the interpretation of the Basic Law, it was for the court to determine whether the matter fell within the ambit of article 158 (3). In the case referred to in question 9, the court had apparently decided that the matter did not need to be referred to the Standing Committee. That decision should have been binding on the Chief Executive, and it was doubtful that he had been justified in asking the Standing Committee for its interpretation of article 24 (2) (3) of the Basic Law.

57. If a court's interpretation was not correct or was inconsistent with the intention of the legislator, then the proper course of action was amendment of the relevant provision. Instead of asking the Standing Committee to amend the

relevant provisions of the Basic Law, however, the Chief Executive had asked it to reinterpret them, thus setting aside a decision of the Court of Final Appeal, the highest court in the HKSAR.

58. On article 17 and the right to privacy, he noted that the Personal Data (Privacy) Ordinance had come into force in December 1996 and asked how the Privacy Commissioner was appointed, whether appointment was for a fixed period, and how he or she could be removed. Did the Commissioner have any powers for enforcing decisions or did he simply make recommendations to the Government? He would like to know more about the work of the Privacy Sub-Committee on media intrusion. Was any action contemplated in line with its findings?

59. Section 33 of the Telecommunication Ordinance and section 13 of the Post Office Ordinance authorized the interception of mail and messages and conferred on the authorities wide-ranging powers which could be abused. In paragraph 18 of the Committee's concluding observations on the previous report, it had expressed concern about those two laws. In response to those observations, the Legislative Council had passed an amendment in June 1997 to restrict the powers of the authorities. The Government had not brought it into effect after the transfer of sovereignty, however, and was apparently studying the implications. But why should that take two years? What steps did the Government propose to take to bring the amendment into force?

60. Lastly, he wished to know the results of the privacy case against a photographer in which there had been a decision of the Privacy Commissioner that an individual could not be photographed in a public place without his or her consent. Had the Privacy Commissioner elaborated a code of practice for determining whether photographers working in public places were guilty of a breach of privacy? Did that not impair the ability of photographers to carry out their journalistic functions?

61. Mr. LALLAH said that the delegation had cited article 2, paragraph 2, of the Covenant in responding to question 9 of the list of issues, but had failed to address an important aspect of that provision, which stated that the Committee's function was to monitor the compatibility with the Covenant of all domestic legislation, including constitutional provisions. Much had been said about the principles used by the Standing Committee in its interpretation of the Basic Law, but it was surprising to have heard nothing about whether the Standing Committee's reasoning had taken any account of Hong Kong's very serious obligations under the Covenant.

62. Question 9 had brought to light a serious conflict between judicial interpretation and legislative interpretation. Interpretation was the proper function of the judiciary, whereas legislative interpretation might be dictated by policy rather than law, by empirical rather than juridical considerations. Once the legislature had passed a law, the courts were required to apply it. If a law was found to be amenable to incorrect interpretation, then the next step was amendment of the Constitution.

63. Freedom of expression was another area which caused him some concern, and he endorsed Mr. Ando's questions on that subject. There had been reports of freedom of expression being curtailed by various means, including the use

of loudspeakers by the police to drown the voices of dissidents, and difficulties in organizing public meetings. Freedom of expression was central to the flourishing of democracy. The law must be interpreted by the police and the administrative authorities in such a way as to further the nascent democracy in Hong Kong.

64. Mr. KLEIN agreed with other members that question 9 had raised a very serious problem. A political body had asked for an interpretation of the law from another political body, and that affected the protection of human rights. The Committee knew from long experience that judicial protection was the best shelter for human rights. Contrary to what had been asserted by the delegation, the procedure in Hong Kong had nothing to do with procedures under the European Court of Human Rights, which was an independent court with all the attributes of independence. That could not be said of the Standing Committee of the National People's Congress.

65. He was troubled by the fact that the competence of the HKSAR Government to seek an interpretation from the Standing Committee could be used at any time before, during or after the court decision and also by the fact that it was based, inter alia, on article 48 (2) of the Basic Law entrusting the Standing Committee with responsibility for implementation of that Law. Power to implement a law could not, in his view, enter into the question of interpretation of that law; it was for the courts to interpret any disputed administrative decision and for the executive to implement the decision thus interpreted. The question he wished to address to the HKSAR delegation was the following. What would happen if a Hong Kong court failed to adopt the interpretation of the law given by the Standing Committee? Would the HKSAR Government also invoke article 48 and/or article 158 of the Basic Law to correct the wrong interpretation underlying the court's decision? He understood that, in the specific case in point, the adjudication had not been set aside, but wondered what might be done in another instance to correct a court decision which, in the Government's view, was based on a mistaken interpretation of the law.

66. With reference to the right to enter one's own country (Covenant, art. 12 (4)), he remarked that the provision in article 8 (4) of the BORO did not seem to correspond fully to the Covenant provision in that it made the right of entry contingent upon the right of abode rather than the other way round. The delegation's views on that point would be welcome.

67. He expressed the hope that steps would be taken very promptly to repeal section 33 of the Telecommunication Ordinance and asked whether the new legislation on that topic, currently under consideration, also provided for information to be given to persons who had been the object of action under the Ordinance in the past. Failure to provide such information would deprive the persons in question of an opportunity to check the lawfulness of the measures taken.

68. Referring to paragraphs 351 and 352 of the report, he noted that the Film Censorship Authority not only dealt with the classification of films by age of admission, but could also decide that a film was not suitable for audiences of any age and could prohibit it from being shown. While accepting the assurance contained in the supplementary report that no political

censorship was being exercised in the HKSAR at present, he remarked that such censorship could be introduced without any change being made in the Film Censorship Ordinance as it stood. In conclusion, he commended the Government's recognition and encouragement of the role played by NGOs in the region.

69. Mr. YALDEN, referring to question 3 of the list of issues, said he was unable to agree with the view expressed in the report and reiterated by the delegation that the Ombudsman was effectively fulfilling the functions of a human rights commission, if only because the Ombudsman's jurisdiction did not extend to the police.

70. In connection with question 4, he agreed with previous speakers that public opinion could not be invoked as a ground for the maintenance of discriminatory laws in the area of race and sexual orientation. Referring to the section of the report dealing with complaints against the police (paras. 55-62), he said that while the Complaints Against Police Office could hardly be considered an objective body, the Independent Police Complaints Council, which undoubtedly was independent, had little or no power. The situation with regard to potential police abuses in the HKSAR must therefore be regarded as highly unsatisfactory.

71. Lord COLVILLE said that, as a national of the previous administrating State, he particularly welcomed the continuing fulfilment by the HKSAR of its reporting obligations under the Covenant and was pleased to be authorized, at last, to participate in the debate. The issue on which he proposed to concentrate was that of the litigation which had taken place in connection with the right of abode (report, paras. 235-246) and its potential implications for other rights under the Covenant.

72. After reviewing the additional information provided in the supplementary report and given to members by the delegation earlier in the meeting, he said that the decision reached by the Standing Committee to declare the court rulings in the cases in question to be inconsistent with the legislative intent of article 158 of the Basic Law was both obscure and unsatisfactory. Where, in particular, was the Court of Final Appeal supposed to have gone wrong? What was the correct interpretation of the test provided for under article 158 (3)? The opinions adopted by the Preparatory Committee on the HKSAR on 10 August 1996 could hardly be regarded as travaux préparatoires, since the Basic Law itself had been passed in 1990. If those opinions were regarded as the correct source of law, why had they not been relied upon by the Government's counsel in the two cases? What was the text of those opinions? How many more such opinions were in existence? And was there any limit on reinterpretative procedures of that kind?

73. The implications of the action taken by the Standing Committee cast doubt on the status of all other Covenant provisions in HKSAR law. Was there any guarantee that the Standing Committee would not use its powers of interpretation under article 158.1 of the Basic Law in relation to any provisions in part III of the Basic Law, or that ex post facto opinions - unpublished at that - would not be relied upon in future to reverse other decisions conscientiously reached by courts of law? That was a matter of serious concern.

74. Mr. SCHEININ said that the continuing enjoyment of rights under the Covenant in the HKSAR represented an important precedent in international human rights law and would be closely monitored by many external observers. Referring, in his turn, to the interpretation procedure in the right of abode issue, he remarked that the resulting situation did not seem consistent with the State party's obligation under article 14 of the Covenant, since there seemed to be a deliberate intention on the part of the executive to interfere with pending judicial proceedings. The problem was further aggravated by the delegation's reference to economic consequences, a factor which surely should not be allowed to influence the right of abode issue. To the argument that the cases referred to the Standing Committee had been exceptional he would reply that the essence of constitutionalism resided, precisely, in the exceptions; moreover, recent press reports from Hong Kong suggested that the interpretation procedure might well be invoked in other cases. To what extent should the procedure be regarded as forming part of the constitutional order of the HKSAR? Was the present reporting exercise sufficient in order to elucidate that question? Did the exercise comply with the requirement of continuity as previously formulated by the Committee and expressed in annex 1 to the Joint Declaration? Were there any ongoing discussions or plans to involve the central Government of China more substantively in the reporting process?

75. Lastly, referring to questions 7 and 10-12 of the list of issues, he noted that paragraph 118 of the report spoke only of torture as a possible obstacle to extradition. So long as China maintained its reservation to article 13 of the Covenant, how could full observance of article 7 be ensured in respect of deportations not involving extradition and cases of cruel or degrading treatment other than torture?

76. Ms. CHANET thanked the HKSAR delegation for an impressively thorough report and particularly welcomed the constitutional status given to provisions of the Covenant under article 39 of the Basic Law. Like previous speakers, she proposed to concentrate on the issue of the interpretative procedure applied in connection with the right of abode and, in particular, on its implications with regard to article 14 of the Covenant.

77. After dismissing as unconvincing the arguments based on comparative law advanced by the HKSAR delegation, she associated herself with Mr. Klein's question as to what would be the situation if the courts failed to adopt the interpretation given to a law by the executive. In that connection, she drew attention to the great importance of the principle of separation of powers in a democracy and, in particular, referred to the Committee's general comment on article 14. Could the interpretation procedure authorized under article 158 of the Basic Law be used if an authority, whether judiciary or executive, found some inconsistency to exist between article 39 and other Basic Law provisions? What guarantees were provided in respect of rights under the Covenant that were not incorporated in the BORO?

The meeting rose at 1 p.m.